United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1624

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

ELIZABETH CAROLYN DUNLAP,

Defendant-Appellant.

----------x

Docket No. 74 - 1624

Appeal From the United States District Court
For the Southern District of New York

BRIEF FOR THE APPELLANT

ANTHONY S. GENOVESE, ESQ.
Attorney for Appellant
Elizabeth C. Dunlap

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APPLICABLE STATUTES

Title 21, United States Code, Section 841(a)(1) provides:

> "Except as authorized by this Title it shall be unlawful for any person knowingly or intentionally --
>
> "(1) to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance."

Title 18, United States Code, Section 2 provides:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principle."

Preliminary Statement

Appellant, Elizabeth Carolyn Dunlap, appeals from the judgment of conviction entered in the United States District Court for the Southern District of New York on May 2, 1974, pursuant to a verdict of the jury rendered on February 19, 1974. The Honorable Arnold J. Bauman presided at trial. Mrs. Dunlap was convicted of aiding and abetting the distribution of cocaine hydrochloride or the possession with intent to distribute cocaine hydrochloride in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A Notice of Appeal was timely filed. The Court of Appeals has jurisdiction pursuant to Title 28, United States Code, Section 1291.

It is the appellant's contention that there was insufficient evidence, as a matter of law, for the case against her to have been submitted to the jury and that the trial judge erred in denying the appellant's motion for judgment of acquittal.

Issue Presented

Was there sufficient evidence upon which a verdict of guilty of the offense charged could be based?

Statement of Facts

Mrs. Dunlap was tried in the District Court for aiding and abetting the distribution of cocaine hydrochloride or the possession with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

The evidence presented by the Government, considered in its most favorable light, reveals the following facts:

1. A New York City Detective, Kenneth Bernhardt, was in January of 1973 assigned to the New York Joint Task Force, investigating narcotics violations (page 1).* Mr. Bernhardt was working in an under-cover capacity, posing as a purchaser of cocaine under the name "Curley" (page 2). Mr. Bernhardt was utilizing the services of an individual named Henry Lee Regan, a New York City Corrections Officer. Regan was unaware that Bernhardt was a police officer and was used by Bernhardt to arrange purchases of cocaine from various individuals with whom Mr. Regan was acquainted.

Prior to the events involving Mrs. Dunlap, Regan had twice arranged for Bernhardt to purchase cocaine. Bernhardt characterized Regan as "a middleman, like a jobber" but not

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*Page references are to the accompanying Appendix.

himself a dealer (page 63). Bernhardt did not know what Regan's motivation was, although he believed that Regan received money or cocaine for arranging the transactions. On at least one occasion, Bernhardt himself gave Regan a teaspoon full of cocaine (pages 82-83).

2. On January 23, 1973, Bernhardt called Regan for the purpose of again finding a source of cocaine. According to his testimony, Regan indicated to Bernhardt that he did not know of anyone who could sell Bernhardt cocaine at that time (page 106).

During the course of this conversation, Mrs. Dunlap rang the bell and was admitted to Regan's apartment. Regan had known Mrs. Dunlap for a few months (page 117). She resided in the building next door to Mr. Regan's and was characterized by Regan as a friend. She would occasionally come to his apartment and listen to music. Regan also took an interest in Mrs. Dunlap's son, who was four or five years of age at the time (page 118).

Regan, after he admitted Mrs. Dunlap to his apartment, resumed the telephone conversation with Bernhardt and told him, "I am sorry, I can't do anything for you. I don't know anybody." (page 119) Regan then, according to his testimony, terminated the conversation (page 119).

Mrs. Dunlap asked Regan what was wrong, whether anything was the matter (page 119). Regan replied, "This guy is a

friend of mine. He is in trouble. He has some money, he wants some cocaine but I don't know anybody who could get him out of trouble, get him the cocaine." (page 119)

Mrs. Dunlap, according to Regan, then said, "Well, I am going downtown, . . . there is a fellow that I know there. He knows a lot of people. Maybe he can help you get some." (page 106)

When Bernhardt called back later that evening, Regan told him that he might be able to do something for him since there were some people downtown who might be able to help get some cocaine (page 106). Regan also testified that Mrs. Dunlap made a telephone call from his apartment and that after that telephone call she gave Regan the address of a bar on Chrystie Street and Rivington Avenue and told Regan to have his friend meet them there (pages 106-107).

3. When next Bernhardt called Regan, it was arranged that Regan and Dunlap would take a cab to the bar and there meet Bernhardt. Bernhardt offered to pay the cab fare (page 108).

Bernhardt was the first to arrive at the bar, accompanied by Detective Dorothy Richardson. Regan arrived with Mrs. Dunlap a short while later. After introductions were exchanged and drinks ordered, Mrs. Dunlap asked the bar maid if "Andy" was there and the bar maid replied that he was not (page 17).

Sometime later, a man later identified as Angel Andino entered the bar. Mrs. Dunlap approached Andino, who was at the other end of the bar, and had a brief discussion with him (page 145). After Mrs. Dunlap called Regan over and introduced him to Andino, the three went into a back room where Regan told Andino that his friend wished to purchase an eighth of a kilogram of cocaine. Andino replied that he could not get an eighth but that he could get an ounce for which he wanted $700. Mrs. Dunlap did not say anything during this conversation (page 148).

Regan returned to Bernhardt and Richardson and informed them of the price. They stated that it was too high and that they were interested in acquiring an eighth of a kilogram. During this conversation, Mrs. Dunlap was at the other end of the bar with Andino (page 55). Bernhardt then approached Andino and introduced himself. He asked Andino when he could get an entire eighth and Andino replied "tomorrow night" (page 57). Detective Bernhardt was uncertain whether Mrs. Dunlap was present when this conversation took place or whether she was talking to Detective Richardson at that time (page 58).

During the entire course of the evening, no comments were made by Mrs. Dunlap concerning the purchase or sale of narcotics, according to Detectives Bernhardt and Richardson and Mr. Regan.

No sale took place on January 23 and Regan and Mrs. Dunlap left the bar shortly before Detectives Richardson and Bernhardt (page 24).

4. Detectives Richardson and Bernhardt returned to the bar on the following evening, January 24, and purchased an eighth of a kilogram of cocaine from Mr. Andino.

Regan testified that he never knew, up until the time of the arrest, whether any sale had, in fact, taken place. Nor did he think that Mrs. Dunlap ever knew what had transpired (page 150).

It was upon this evidence that the jury found that Mrs. Dunlap had aided and abetted the sale of cocaine or the possession with intent to sell cocaine. Mrs. Dunlap moved for judgment of acquittal at the close of the Government's case and again after the verdict was rendered. The motion was denied on each instance.

Argument

THE EVIDENCE ADDUCED AT TRIAL, EVEN WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT, IS INSUFFICIENT TO SUSTAIN A CONVICTION OF THE OFFENSE CHARGED

Title 21, United States Code, Section 841(a)(1) provides:

> "Except as authorized by this Title it shall be unlawful for any person knowingly or intentionally --

"(1) to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance."

Title 18, United States Code, Section 2(a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

It is the appellant's position that insufficient evidence was introduced at trial to hold her culpable as an aider and abetter to the substantive crime. There is no evidence that Mrs. Dunlap in any way associated herself with the venture and participated in it as something she sought to bring about.

The most widely quoted definition of "aiding and abetting" appears in Judge Learned Hand's opinion in United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) in which it was stated, after a discussion of "aiding and abetting" as the term was used in the common law:

"It will be observed that all these definitions have nothing whatsoever to do with the probability that the forbidden result would follow upon the accessory's conduct and that they all demand that he in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by this action to make it successful. All the words used -- even the most colorless, 'abet' -- carry an implication of purposive attitude towards it." [100 F.2d at 402]

Furthermore, even if Mrs. Dunlap did associate herself with the venture as something which she sought by her affirmative actions to make succeed, she did so on behalf of the purchaser and not of the seller.

Since Title 21, United States Code, Section 841(a)(1) makes it unlawful to "manufacture, distribute or dispense" a controlled substance, one who aids and abets the purchaser would not be culpable under the statute since the purchaser himself is not engaged in an unlawful act under the statute.

The evidence introduced at trial by the Government, outlined in the Statement of Facts above, which refute the proposition that Mrs. Dunlap aided and abetted Mr. Andino in the sale of cocaine are:

1. It was at the behest of Regan, acting for the purchaser, Bernhardt, that Mrs. Dunlap introduced them to Andino.

2. Mrs. Dunlap did not indicate, in her discussion with Regan prior to the introduction, that Andino was the seller of cocaine. She merely stated, "There is a fellow that I know down there. He knows a lot of people. Maybe he can help you get some."

3. At the bar, Mrs. Dunlap did not participate in any discussions concerning the sale of cocaine. Her sole activity was

to introduce Regan to Andino.

4. No sale of cocaine took place in Mrs. Dunlap's presence. Nor is there any indication that she ever became aware of the fact that a transaction took place on the following evening.

5. There is no evidence that Mrs. Dunlap received any compensation for introducing Regan to Andino.

6. There is no evidence that Mrs. Dunlap was acting, or had ever acted, as an agent or joint venturer with Mr. Andino.

A. Mrs. Dunlap Did Not Act with the Purposive Attitude Necessary to Hold Her Culpable as an Aider and Abettor

It is the appellant's position that her conduct was not of such a nature as to sufficiently comprise the association with the venture necessary as a predicate for culpability as an aider and abettor. Rather, her limited participation in the purchase was done without either a concern or an interest in its success.

In Robinson v. United States, 262 F.2d 645 (9th Cir. 1959) an informer telephoned the defendant and stated that he wanted to buy heroin. The informer was invited to the defendant's house where he repeated his request and was given

a name of a third person. The informer telephoned the third person and arranged a purchase which took place a short time later.

The informer and the defendant had a telephone conversation on the following day in which the defendant indicated that he knew that the sale had taken place.

From the conviction for facilitating the sale of a narcotic drug, the defendant appealed. In rejecting the Government's argument that the defendant facilitated the sale or, at the least, aided and abetted it, the Court held:

> "We cannot find in the evidence before us anything that indicates Robinson wished to bring about the sale Lowe made to Commack. He may very well have, in view of his alleged previous sales, but there is no proof as to his wishes as to this sale! There is not the slightest evidence that Robinson ever had possession of the narcotic, participated in its sale, or received any of the proceeds thereof." [262 F.2d at 64 (Emphasis in original.)]

In Morei v. United States, 127 F.2d 827 (6th Cir. 1942), a physician was approached by a Government informer who told the physician that he wanted heroin to "soup" race horses. The informer gave the doctor the names of certain horses who would be given the heroin so that the doctor could bet on them. The physician stated that he did not have any heroin but gave the informer the name and address of another person who, he said, would have heroin and told the informer to tell that person that the doctor had sent him. In reversing the conviction of the physician as an aider and abettor, the

Court held:

> "There was no evidence that Dr. Platt planned with the other defendants or conspired directly or indirectly with them, or had any understanding with Morei [the person to whom Platt referred the informer] to buy or sell narcotics. There was no community of scheme between him and the other defendants. They shared in no common intent or plan, nor was there any prearrangement or concert of action. Dr. Platt was paid nothing nor is it claimed that he asked for any remuneration or expected to receive anything from the claimed transaction. Accepting the facts as contended by the prosecution . . . the only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin . . . this is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of sale or possession of narcotics either as a principle, aider and abettor or accessory before the fact." [126 F.2d at 831-832]

It should be noted that, in both of these cases, United States v. Robinson and Morei v. United States, while the Courts held that there was insufficient evidence to hold the defendants guilty of aiding and abetting the transactions, the defendants' participation in the venture exceeded the participation of Mrs. Dunlap in the instant case. In Robinson, the defendant indicated that he was aware of the fact that a sale had taken place. In Morei, the defendant was given the names of the horses which were to receive the heroin so that he could receive financial reward by betting on them.

Mrs. Dunlap's involvement was also significantly less than the participation of other defendants in instances where the Courts have held there to have been sufficient evidence to convict for aiding and abetting.

For example, in United States v. Manna, 353 F.2d 191 (2d Cir. 1965) the defendant was convicted of aiding and abetting the sale of heroin. A federal narcotics agent, accompanied by an informer, sought to purchase heroin from the defendant. The defendant sent them to a third person with a message that the defendant wanted the third person to take good care of them. There was evidence that the third person made the sale reluctantly and only because of the defendant's request. Moreover, the defendant told the narcotics agent that he would have made the sale himself were it not for the fact that heroin was in short supply and he was awaiting a shipment. The defendant instructed the agent to keep in close contact with him in view of the expected shipment.

The Court held that while it was not necessary for an aider and abetter to have a direct financial interest in a sale, the evidence supported the conclusion that the defendant tried to satisfy the agent so that he could retain him as his

customer with the prospect of making a future sale to him.

The Court further held:

> "There is enough evidence here to support the conclusion that Manna was an aider and abetter. He had sufficient ability, influence and control here to bring about a sale that, without his participation, would not have been made." [353 F.2d at 192]

In United States v. Atkins, 473 F.2d 308 (8th Cir. 1973) the defendant was found guilty of aiding and abetting the purchase of heroin. The defendant had actively solicited a buyer for the heroin purchased by her principal. She introduced the prospective buyer to the seller and remained in their presence while the narcotics were tested for quality and the sale was discussed. She met with the seller after the sale and discussed with her the details of the transaction.

The Court found this last element of special significance:

> "An inference may be fairly drawn that the appellant's interest in the transaction was not fleeting but was intense enough to continue even after the purchase had been consumated. Accordingly, this evidence is highly probative of the appellant's state of mind when she engaged in the foregoing activity and is inconsistent with the assertion that the appellant did not care whether Brittain did or did not make the purchase." [473 F.2d at 311]

Mrs. Dunlap's participation in the venture, such as it was, ended before any sale was made. There is no evidence

to indicate that she had any interest as to whether or not a sale took place or not. Moreover, the evidence indicates that there was considerable doubt, in her mind, as to whether the person who she intended to introduce Regan and Bernhardt to was, in fact, a seller of cocaine. When Regan told her that a friend of his was in trouble and needed to buy some cocaine, Mrs. Dunlap, according to Regan, said "Well, I am going downtown, . . . There is a fellow that I know down there. He knows a lot of people. Maybe he can help you get some." The ambiguity of this statement is self-evident. There was doubt in Mrs. Dunlap's own mind as to whether Andino was a seller of cocaine or whether he might simply know someone who sold cocaine.

It turned out that Andino did sell cocaine to Bernhardt on the night after the meeting at the bar. But it is highly questionable whether Mrs. Dunlap's participation in the events of January 23, 1973, rises to the level of participation in the venture as something she wished to bring about and make successful. The Government's evidence against Mrs. Dunlap negates such an interpretation of the facts. There is nothing to indicate that she expected to receive or did receive any renumeration for the introduction. Nor is there any indication that Mrs. Dunlap was ever even

aware of the fact that a sale had taken place. While it is true that, were it not for her intercession Regan might never have met Andino, this fact alone is insufficient to hold her culpable as an aider and abetter (United States v. Robinson, supra; Morei v. United States, supra; United States v. Moses, 200 F.2d 166 (3rd Cir. 1955).

B. If Mrs. Dunlap Aided and Abetted Anyone, It Was The Purchaser and Therefore Did Not Violate the Statute

If Mrs. Dunlap was acting for anyone in the transaction, it was the prospective purchasers and it must be they who she aided and abetted. Title 21 United States Code, Section 841(a)(1) makes it unlawful for a person knowingly and intentionally to "manufacture, distribute, or dispense a controlled substance". To be held culpable as an aider and abetter the defendant must have associated himself with the person who manufactured, distributed or dispensed the substance. Since the purchaser himself is not punishable under this statute, one who aids and abets the purchaser cannot be liable either.

As was stated by the Court in United States v. Moses, 220, F.2d 166 (3rd Cir. 1955):

> ". . . [I]t has been a general rule under the prohibition acts, national and state, that one who has acted without interest in the selling cannot be convicted as a seller even though his conduct may in fact have facilitated an

> illegal sale. See cases collected in Notes, 24 L.R.A., N.S. 268 and 28 L.R.A., N.S. 334. Moreover, emphasis on those facts which show collaboration and association is characteristic of judicial analysis in those cases where convictions of aiding and abetting have been sustained. Pereira v. United States, 1954, 347 U.S.1, 74 S.Ct. 358, 98 L.Ed. 435; Smith v. United States, 8 C.I.R. 1931, 50 F.2d 46; Parisi v. United States, 2 Cir., 1922, 279 F.253; Jin Fuey Moy v. United States, 1920 254 U.S. 189, 41 S.Ct. 98, 65 L.Ed. 214." [220 F.2d at 169]

In United States v. Moses, supra, the defendant was convicted of aiding and abetting the sale of narcotics in violation of Title 26 United States Code, Sections 2553(a) and 2554(a). Two narcotics agents came to the defendant's home and asked her to help them obtain heroin. The defendant stated that she knew of two possible sources and that one of them, a regular supplier, would be arriving shortly. When this individual did not arrive promptly, she telephoned the other source, but was unable to reach him. The first supplier finally appeared and the defendant introduced the agents to him and told him that they wished to purchase drugs. The seller was apparently hesitant, but the defendant vouched for the fact that the agents were "all right".

The agents then told the source the amount and type of drugs they desired and discussed the price with him. The

defendant took no part in these conversations although she did hear them. The agents subsequently purchased drugs from the source outside of the presence of the defendant.

In reversing the conviction of the defendant, the Court of Appeals for the Third Circuit stated:

> "The undisputed facts show the appellant acted solely at the behest of the prospective buyers and in their interest. At the buyer's request she did two things to facilitate their purchase, she introduced them to the seller and she vouched for their bona fides, if purchasers of contraband drugs can be so characterized. That is all that was proved. There was nothing to show that she was associated in any way with the enterprise of the seller or that she had any personal or financial interest in bringing trade to him. Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller. For this reason the conviction cannot be sustained." [220 F.2d at 168]

It is purely at the behest of the prospective purchasers that Mrs. Dunlap introduced them to a person who she felt might be able to obtain cocaine from them. Her participation in the venture terminated once she had done this.

Conclusion

Insufficient evidence was presented at trial for the case against the appellant to have been submitted to the jury on the charge of aiding and abetting the sale of cocaine or the possession with intent to sell cocaine.

There is no evidence that the appellant participated in the sale as something which she wished by her affirmative actions to make successful.

Further, if the appellant aided and abetted anyone, it was the purchaser and not the seller. Since the purchaser is not himself culpable under Title 21, United States Code, Section 841(a)(1), one who aids and abets the purchaser is not acting in violation of the statute.

The judgment of the District Court should be reversed.

Respectfully submitted,

ANTHONY S. GENOVESE
Attorney for Appellant
Elizabeth Carolyn Dunlap
120 Broadway
New York, New York 10005

JOEL H. BLUMKIN, ESQ.
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 74-1624

-against- :

ELIZABETH CAROLYN DUNLAP, : AFFIDAVIT

Defendant-Appellant. :

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH J. AMUSO, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 550 South 11th Avenue, Mount Vernon, New York.

That on the 9th day of July, 1974, deponent served the Appendix herein on Paul J. Curran, United States Attorney for the Southern District of New York, by personally delivering two true copies of said Appendix to Don D. Buchwald, an Assistant United States Attorney for the Southern District of New York.

Joseph J. Amuso

Joseph J. Amuso

Sworn to before me this
11th day of July, 1974.

ROBERT A. WARREN
Notary Public, State of New York
No. 24-0539700
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ELIZABETH CAROLYN DUNLAP,

Defendant-Appellant.

Docket No. 74-1624

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOEL H. BLUMKIN, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 16 West 16th Street, New York, New York.

That on the 10th day of July, 1974, deponent served the Brief for the Appellant herein on Paul J. Curran, United States Attorney for the Southern District of New York, by personally delivering two true copies thereof to a person of suitable age and discretion at the Office of the United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York.

Joel H. Blumkin

Sworn to before me this
11th day of July, 1974.

ROBERT A. WARREN
Notary Public, State of New York
No. 24-9539700
Qualified in Kings County
Commission Expires March 30, 1976